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No. 79-1996

# In the Supreme Court
OF THE
# United States

OCTOBER TERM, 1979

DISTRICT ATTORNEY FOR THE COUNTY OF SACRAMENTO,
*Petitioner*

vs.

THE SACRAMENTO COUNTY CIVIL SERVICE COMMISSION, and
THE SACRAMENTO COUNTY BOARD OF SUPERVISORS,
*Respondents*

## RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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## RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

## I

## PRELIMINARY STATEMENT

### A. The Instant Petition for Writ of Certiorari Seeks Review of a Decision of the California Supreme Court Which Holds That a Governmental Entity May Voluntarily Adopt a Race Conscious, Affirmative Action Hiring Program of Limited Duration to Alleviate an Underrepresentation of Minority Employees Which the Entity Finds Is Attributable to Its Own Past Discriminatory Employment Practices

The instant petition arises out of a mandamus proceeding which was filed in 1975 by the Sacramento County District Attorney against the Sacramento County Civil Service Commission. The District Attorney's action was filed because the Sacramento County Civil Service Commission had

issued an order pursuant to Commission Rule 7.10, titled "Minority Preference Appointment". Commission Rule 7.10 is quoted in full in the decision of the California Supreme Court (26 Cal.3d 263-264).

The Commission's order would have required that appointments in the class of Attorney I in the District Attorney's office be made ". . . on the basis of an alternating ratio of 2:1 so that at least one minority person is appointed for every two non-minority persons . . ." and that said ratio ". . . be applied *only* until the percentage of minorities in the classes of Attorney I and Attorney II in the District Attorney's office is 8%." (26 Cal.3d 266, emphasis added)

The actual impact of the Commission's order would have been extremely nominal. At the time of issuance of the order there were 65 attorneys on the District Attorney's legal staff, 34 of whom were in the Attorney I and Attorney II classifications. The 8% goal specified in the order would have been met by the employment of three minority attorneys (8% of 34 = 2.72). Thus, even if the only minority attorney already employed in the District Attorney's office had been appointed to Attorney III, the Commission's order would have required only that three of the next nine attorneys hired by the District Attorney be qualified minorities. (26 Cal.3d 266, fn. 4)

The District Attorney's action presented two basic issues to the trial court:

(1) the validity of Commission Rule 7.10 on its face; and

(2) the adequacy of the evidence as a basis for the Commission's order pursuant to Rule 7.10.

The trial court disposed of the case based solely on a determination that Rule 7.10 was unconstitutional on its face, without considering the question of whether the evidence was adequate as a basis for the Commission's order (26 Cal.3d 267)

On appeal, as indicated in the petition, the California Third District Court of Appeal affirmed the trial court's ruling. Like the trial court decision, the decision of the California Third District Court of Appeal turned solely on the question of the validity of Commission Rule 7.10 and did not purport in any way to consider the adequacy of the Commission's hearing and the evidence presented to the Commission as a basis for the Commission's order (petition pp. A-68 to A-85). It should be noted, however, that the decision of the California Third District Court of Appeal does not constitute a part of California decisional law because it was entirely nullified and vacated when the California Supreme Court granted the respondents' petition for a hearing. This point is discussed in more detail below.

In reversing the decision of the trial court, the California Supreme Court also considered only the question of the validity of Commission Rule 7.10. The California Supreme Court decision does not in any way purport to consider the adequacy of the evidence which was the basis for the Commission's order. It is for this reason that the California Supreme Court remanded the case to the trial court for further proceedings (26 Cal.3d 285-286).

Much of the instant petition is devoted to contentions that have nothing to do with the validity of Rule 7.10. In addition to premature contentions regarding the procedures followed by the Commission and regarding the adequacy of the evidence, the petition contains a considerable amount of other "background" information which is not supported by anything in the record and is, in many instances, either misleading or just plain factually inaccurate.

At page 2 of the petition, there is a reference to the opinion of the Court of Appeal for the State of California, Third District, and the citation "77 Cal.App.3d 234, 143 Cal.Rptr. 483". A copy of the referenced Court of Appeal opinion accompanies the petition starting at page A-68 as

Appendix B. This reference erroneously implies that there is in existence under California law an appellate decision in this case other than the one issued by the California Supreme Court. Contrary to this implication, as a result of the granting of a hearing by the California Supreme Court, the decision of the Court of Appeal, Third District, was entirely and completely vacated and nullified. *People v. Rogers* (1978) 21 Cal.3d 542, 547, *Bloom v. Municipal Court* (1976) 16 Cal.3d 71, 74, fn. 2, and Cal. Rules of Court, Rule 976(d). It is impossible to find the cited case in the California Official Reports because it has been deleted from the bound volume of 77 Cal.App.3d.

Where the California Supreme Court has granted a hearing in a case which has been decided by the California Court of Appeal, without some further *express act* of approval or adoption of the Court of Appeal's opinion by the California Supreme Court, the Court of Appeal's opinion and decision are of no effect whatsoever as a judgment, or as a precedent to be followed, in the decision of legal questions that may thereafter arise. *It is just as if the Court of Appeal's opinion and decision had not been written. Knouse v. Nimocks* (1937) 8 Cal.2d 482, 483-484.

Thus, under California law, the only California appellate court decision extant in relation to the instant case is the one filed by the California Supreme Court on January 25, 1980, in *Price v. Civil Service Commission* and reported in the California Official Reports at 26 Cal.3d 257. The California Court of Appeal's opinion and decision in the instant case have been entirely superseded by the opinion and decision of the California Supreme Court. The Court of Appeal's decision no longer exists as a matter of law and its citation for any purpose is improper. *Coalition for L. A. County Planning, etc., Interest v. Board of Supervisors* (1977) 76 Cal.App.3d 241, 250, fn. 9.

Another misleading aspect of the petition for certiorari is the petitioner's use of the word "involuntary" with reference to the affirmative action hiring program provided for by Commission Rule 7.10 (petition pp. 2 and 3). The fact is that implementation of a minority hiring program under Rule 7.10 does constitute *voluntary* action by the County of Sacramento for the purpose of remedying the effects of past discriminatory employment practices. In a comprehensive sense, an order by the Commission pursuant to Rule 7.10 represents *voluntary action by the County* to achieve the objectives of Title VII of the Civil Rights Act of 1964 by providing equality of employment opportunities and removing barriers that have operated in the past to favor an identifiable group of white employees over other employees.

Rule 7.10 provides a vehicle for the Civil Service Commission to exercise its responsibilities to take such action as the charter designated administrator of the County's personnel system. For the purposes of Title VII of the Civil Rights Act of 1964 and Commission Rule 7.10, the County of Sacramento constitutes but a single employer. This is so, irrespective of the fact that an employer, like the County of Sacramento, is sub-divided for organizational purposes into various departments or other subunits.

As stated by the California Supreme Court, the affirmative action plan at issue was *voluntarily* adopted by the County of Sacramento, since the plan was implemented by the Commission (the County department which the charter invests with authority over procedures for selection of civil service employees) without any compulsion by federal or state authorities.

> "The fact that a head of one of the constituent departments of the County employer, i.e., the District Attorney, disagreed with the adoption of such a plan does not, of course, render the plan 'involuntary' any more

> than the disagreement of one of a private employer's foremen or department heads would render a plan adopted by the responsible official of such an employer involuntary." (26 Cal.3d 257, 270-271, fn. 9)

Particularly perplexing are the petitioner's references to the fact that the District Attorney is "an official elected by the citizens of his community" while the members of the Civil Service Commission "have not been elected by the people" (petition p. 13). The preceding quoted references, together with a statement that appears later in the petition characterizing the Commission as "a non-elected group of five persons with no special qualifications" (petition p. 23) are apparently intended to imply that an elected officer is somehow better qualified to discharge the duties and responsibilities of his office than an appointed officer. The petitioner, of course, cannot cite any authority for such a proposition.

It must be conceded that selection of a public official by an appointment process provides no guarantee that the person appointed will be "qualified" for the performance of the duties and responsibilities of the office. However, this is just as true of the use of the election process for selection of public officials as it is of the appointment process. The fact is that Sacramento County has been extremely fortunate in that for many years the persons appointed as members of the Civil Service Commission have been carefully selected and are extremely well qualified, by virtue of their experience or training, or both, for the performance of their duties and responsibilities as members of the Commission.

As has been previously noted, much of the petition is devoted to discussion of the petitioner's views regarding the propriety of the Commission's procedures and the adequacy of the evidence as a basis for the Commission's order which would have implemented Rule 7.10 in the Dis-

trict Attorney's office. As also previously noted, all of the discussion along this line is inappropriate because of the fact that the decision of the California Supreme Court related solely to the validity of Rule 7.10 and did not in any way purport to deal with questions regarding the Commission's procedures or the evidence. Even though such discussion is not relevant to the question of the validity of Rule 7.10, such discussion includes comments in addition to those discussed above which are misleading and which warrant at least minimal response in this brief. For example, the petitioner refers to the Commission's hearings as "non-adversary" and complains that there were "no procedural safeguards . . . was no requirement for sworn testimony, for the examination of witnesses, for the application of basic rules of evidence, for the recordation of hearings, or for review on appeal" (petition pp. 8 and 23).

Such comments relate solely to questions which are not ripe for review by this Court because they have not been considered by any California court. See *Clay v. Sun Ins. Office, Ltd.* (1960) 363 U.S. 207, 211-212. For example, it is entirely conceivable that under California law, the function of the Civil Service Commission in implementing Rule 7.10 is quasi-legislative, as distinguished from quasi-judicial, and that technical evidentiary and procedural rules are therefore not applicable to the Commission's proceedings under Rule 7.10. Insofar as application of Rule 7.10 to the District Attorney's office is concerned, there are many legal issues which should be considered by the California courts before they will be ripe for consideration by this Court (*Clay v. Sun Ins. Office, Ltd., supra* ).

It should also be noted that the District Attorney's office was represented at all times by members of that office during the course of the Commission's proceedings under Rule 7.10. While the District Attorney's representatives did disagree with the Commission's view regarding the signifi-

cance of the evidence considered by the Commission, the District Attorney's representatives did not at any time complain that they were not afforded a full opportunity to present evidence on their own behalf or to examine witnesses. The District Attorney's representatives also did not at any time assert that the Commission's hearing should have been conducted in accordance with the technical procedural and evidentiary rules applicable in court trials.

At pages 12 and 13 of the petition, the District Attorney characterizes the effect of the California Supreme Court's decision in the instant case as "enormous" because it "mandates" the government "to blatantly discriminate, in public employment, against its citizens". This statement, like others in the petition, is extremely misleading. The decision of the California Supreme Court mandates nothing. As is discussed in more detail elsewhere in this brief, the California Supreme Court's decision does no more than uphold Rule 7.10 on its face as a legally sufficient basis for an order by the Civil Service Commission, issued after a hearing on the basis of *evidence which meets the requirements of Rule 7.10.*

The opinion and decision of the California Supreme Court does not mandate application of Rule 7.10 with respect to the District Attorney's office or with respect to any other County office or department. On the contrary, it is clear that the question of whether Rule 7.10 was properly implemented with respect to the District Attorney's office on the basis of sufficient evidence is a question which has not yet been determined by any California court. It is for this reason that the California Supreme Court expressly remanded the case back to the trial court for a determination of whether the evidence before the Commission was adequate as a basis for implementation of Rule 7.10 in the District Attorney's office as provided in the Commission's order of September 25, 1975 (see 26 Cal.3d 257, 285-286).

At two points in the petition, without any indication or explanation of its intended significance, the petitioner refers to the fact that the decision of the California Supreme Court in the instant case was "a four to three decision" (petition pp. 4 and 12). The apparent purpose of referring to this fact is to indicate that the decision of the California Supreme Court is somehow defective or entitled to less weight than would be the case if the decision was unanimous. As is the case with decisions of other state courts, as well as decisions of the United States Supreme Court, under California law a decision of the California Supreme Court concurred in by a majority of the judges of the court is binding as a precedent. A dissenting opinion of the California Supreme Court has no function except to express the dissenter's private view (*Athearn v. Nicol* (1921) 187 Cal. 86, 93 and *Wall v. Sonora Union High School District* (1966) 240 Cal.App.2d 870, 872).

Of far greater importance is the content of the opinion and decision of the California Supreme Court. It is comprehensive and well reasoned. It thoroughly discusses and refutes each and every one of the District Attorney's contentions regarding the validity of Rule 7.10.

## II

## ISSUES

A. The issues presented by the petition are:

1. Whether the controversy between the parties has become moot during the pendency of this litigation;

2. Whether the Sacramento County District Attorney has standing to challenge the validity of Commission Rule 7.10 in the United States Supreme Court;

3. Whether Rule 7.10 of the Sacramento County Civil Service Commission is valid.

B. The issue of whether the Commission's order pursuant to Rule 7.10 in the instant case was supported by adequate evidence is not properly before this Court because that issue has not yet been considered by the California courts.

## III

## REASONS FOR NOT GRANTING THE WRIT

### A. The Controversy Between the Parties Has Become Moot During the Pendency of This Litigation Because the Number of Minority Attorneys Employed by the District Attorney Has Exceeded the Number Which Would Have Been Required by the Commission's Order Under Rule 7.10 and the Commission Has Vacated the Order of Which the District Attorney Complains

The order of the Sacramento County Civil Service Commission which prompted the District Attorney to initiate proceedings in the trial court was issued by the Commission on September 25, 1975. The decision of the California Supreme Court upholding Rule 7.10 and remanding the case to the trial court became final on March 20, 1980, upon denial of the District Attorney's petition for rehearing.

During the four and one-half year period while the litigation was pending, because of the action filed by the District Attorney, the Commission's order of September 25, 1975, was not at any time implemented and Commission Rule 7.10 was not in any way utilized or applied as a basis for appointment to any attorney position in the District Attorney's office. Nevertheless, as a result of the appointments made by the District Attorney's office while the instant litigation was pending, without any use of an alternating ratio as a basis for attorney appointments pursuant to Commission Rule 7.10 and without any implementation of the Commission's order of September 25, 1975, the 8% goal specified in the Commission's order was reached. The 8% goal was actually substantially exceeded.

The high point in the percentage of minority attorneys in the District Attorney's office was reached on or about March 22, 1978, when the number of minority attorneys at the Attorney I level equaled 50% and the number of minority attorneys at the Attorney II level equaled 11.76%, resulting in a combined percentage of minority attorneys at the Attorney I and Attorney II levels of 21.7%. The foregoing information was gathered by the County's Department of Personnel Management and summarized in a report dated April 3, 1980 (see Appendix to this brief).

Accordingly, on April 24, 1980, prior to the filing of the instant petition for certiorari, the Commission issued a new order which entirely rescinded the Commission's order of September 25, 1975, and which expressly provides that the Commission's order of September 25, 1975, ". . . shall not be implemented nor be of any effect for any purpose whatsoever." The facts regarding the Commission's action in rescinding its order of September 25, 1975, are stated in detail in the Commission's order of April 24, 1980, the full text of which is set forth as Appendix A hereto.

A case becomes moot when it can be said with assurance that there is no reasonable expectation that the alleged violation of a party's rights will recur and interim events have completely and irrevocably eradicated the effects of the alleged violation. "Simply stated, a case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Powell v. McCormack* (1969) 395 U.S. 486, 496 and *County of Los Angeles v. Davis* (1979) 440 U.S. 625, 631.

In summary, the Commission's order of September 25, 1975, was never in any way implemented. During the pendency of this litigation the number of minority attorneys in the District Attorney's office reached a level which substantially exceeded the 8% goal specified in the Commis-

sion's 1975 order. As a result, on April 24, 1980, the Commission formally recognized that its order of September 25, 1975, could no longer serve any purpose nor be of any effect and entirely rescinded the earlier order, expressly providing that the order of September 25, 1975, would not be of any effect "for any purpose whatsoever". (Appendix) The rules for determining mootness, as enunciated in the *Powell* and *Davis* cases, *supra,* are applicable here. The alleged violation (i.e., the Commission's order of September 25, 1975) has not had any effect whatsoever on the District Attorney's office. Any potential for effect which the order *might* have had has been entirely eradicated by subsequent events (i.e., the attainment through normal hiring practices of the percentage of minority attorneys specified in the Commission's order and the Commission's action on April 24, 1980, formally rescinding the earlier order). As a result of these substantial changes in the circumstances, there is simply no current basis for any expectation that the alleged violation will recur and this case has therefore become moot.

**B. The District Attorney Does Not Have Standing to Challenge the Validity of Commission Rule 7.10 in the United States Supreme Court**

As discussed above under Part IIIA, prior to the filing of the instant petition for certiorari in this court, the Civil Service Commission rescinded its order of September 25, 1975, because of the fact that the percentage of minority attorneys in the District Attorney's office had not only reached the 8% goal specified in the order, the percentage had in fact substantially exceeded that goal. It is clear that this increase in the percentage of minority attorneys in the District Attorney's office was achieved as a result of normal hiring practices and was not in any way a result of or an effect of the Commission's order of September 25, 1975, pursuant to Rule 7.10.

All the District Attorney can argue in support of the petition for certiorari at this time is that the Commission *might* at some time in the future attempt to again implement the provisions of Commission Rule 7.10 in some manner in the District Attorney's office. Such an argument is speculative and hypothetical. It is inadequate as a basis for review of the validity of Commission Rule 7.10 by the United States Supreme Court at this time.

It is established beyond peradventure that in order to have standing to challenge the validity of a statute, a party must have a ". . . personal, concrete, live interest in the controversy". See *Baker v. Carr* (1962) 369 U.S. 186, 204, and *Andrus v. Allard* (1979) ..... U.S. ....., 62 L.Ed.2d 210, 222.

A party has standing to challenge the constitutionality of a statute only insofar as it has an adverse impact on his own rights. As a general rule, if there is no constitutional defect in the actual application of the statute to a litigant, he does not have standing to argue that it would be unconstitutional if applied in hypothetical situations. *Ulster County Court v. Allen* (1979) 442 U.S. 140, 155.

In the instant case, the possible effect of the alleged violation (i.e., the Commission's order of September 25, 1975) has been entirely eradicated by the Commission's action on April 24, 1980, rescinding the earlier order. The mere existence of Commission Rule 7.10 at this time in no way affects the District Attorney or the operations of his office. All that the District Attorney can do at this time, based on hypothetical examples and speculation, is argue that Rule 7.10 *might* be applied at some future time by the Commission in a manner which conflicts with the rights of the District Attorney or of other persons who are not parties to the instant litigation.

In summary, although the Commission originally intended that its order of September 25, 1975, would be ap-

plied in the District Attorney's office and would have an effect (albeit nominal) on the hiring of minority attorneys in that office, the order was never, at any time, actually applied and had no effect whatsoever on the District Attorney's office. While this litigation has been pending, normal hiring practices have resulted in a percentage of minority attorneys in the District Attorney's office which substantially exceeded the 8% goal specified in the Commission's order of September 25, 1975, and that order was entirely rescinded by the Commission on April 24, 1980, prior to the filing of the instant petition for certiorari in this court. At this time, any argument which the District Attorney might make in support of standing to question the validity of Commission Rule 7.10 depends entirely on hypothetical examples and speculation. Under the decisional law discussed above, this is inadequate as a basis for establishing standing on the part of the District Attorney at this time to assert the invalidity of Commission Rule 7.10.

### C. Rule 7.10 Provides a Valid Procedure for Voluntary Action by Sacramento County to Remedy the Effect of Past Discriminatory Employment Practices

#### 1. Rule 7.10 requires a finding of past discrimination sufficient to violate Title VII of the 1964 Civil Rights Act

Rule 7.10 requires the Civil Service Commission of Sacramento County to hold public hearings to collect evidence on discriminatory employment practices, and to make specific findings before ordering a remedy. The relevant necessary findings are: (1) that a particular County employment classification has a disproportionately low number of minority personnel in relation to County population; (2) that the disproportionate representation was caused by discriminatory employment practices. Rule 7.10(c)(1) and (2).

"Discriminatory employment practice" is defined as "selection methods or selection criteria not related to the job". Rule 7.10(b)(2). The petitioner asserts (p. 21) that this definition is too broad, encompassing practices which have no adverse impact on minorities. However, as the California Supreme Court noted, it is clear in the context of the rule as a whole that in its application "discriminatory employment practices" refers exclusively to practices which adversely affect minorities. 26 Cal.3d 257, 264, n. 2, and 282, n. 19.

When non-job related selection criteria result in a disproportionately low number of minority hirings, the employer is in violation of Title VII, whether or not the discrimination is intentional. *Griggs v. Duke Power Company* (1971) 401 U.S. 424, 431-432, interpreting 42 U.S.C. § 2000(e)-2(h); *Albemarle Paper Company v. Moody* (1975) 422 U.S. 405, 425. Thus, a finding under Rule 7.10 is precisely a finding that a County office is in violation of Title VII.[1]

Indeed, the Civil Service Commission asserted its focus on Title VII violations in its findings regarding the District Attorney when it stated:

> "In implementing rule 7.10, it is the intent and purpose of the Commission to adjust for the adverse effect on minorities of past discriminatory employment practices on the basis of substantially the same considerations and decisional law as would be applicable in court in a civil rights action seeking injunctive relief in cases in which there is no evidence of intentional discrimination." 26 Cal.3d at 282, n. 19.

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[1]See 26 Cal.3d at 262-265 for a history of Rule 7.10.

### 2. Where there is a finding of past discrimination in violation of Title VII, the race conscious remedy provided for by Rule 7.10 follows long-standing Supreme Court principles

The alternating appointment remedy is authorized by Rule 7.10 to correct for proven past discrimination. This race conscious remedy follows a principle laid down by this Court 15 years ago.

> "Where racial discrimination is concerned, 'The [district] court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future.'" *Albemarle Paper Company v. Moody, supra,* 422 U.S. 405, 418, quoting *Louisiana v. United States* (1965) 380, U.S. 145, 154.

This principle has been used to develop race conscious remedies in voting cases (*Louisiana v. United States, supra*), school desegregation cases (*Swann v. Charlotte-Mecklenburg Board of Education* (1971) 402 U.S. 1, 28 and companion cases), and employment cases (*Albemarle, supra; Franks v. Bowman Transp. Co., Inc.* (1975) 424 U.S. 747, 767-771; *United Steelworkers, etc. v. Weber* (1979) 443 U.S. 193; *see* discussion, *infra*).[2]

### 3. Under Weber, the race conscious remedy provided for by Rule 7.10 is consistent with Title VII

In *United Steelworkers v. Weber, supra,* this Court decided that *even without a finding of past discrimination,* a voluntary affirmative action plan may be consistent with § 6703(a) and (d) of Title VII of the 1964 Civil Rights Act. 42 U.S.C. § 2000(e)-2(a) and 2(d).

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[2]The petitioner's claim that only individual victims of employment discrimination are entitled to relief under Title VII is conclusively refuted by *Albemarle, supra,* and by *Weber, supra.*

*Weber* approved of the Kaiser Aluminum-United Steelworkers' plan to reserve 50% of the positions in a craft training program for black employees, in order to transform Kaiser's virtually all-white craft work force in its various plants to one reflecting the percentage of blacks in the local work forces generally. There was no finding in *Weber* of past discrimination by either Kaiser or USWA. Indeed, there was no investigation of Kaiser's employment practices by any authorized agency.[3] The instant case involves a voluntary (*see, infra*) plan to remedy specific past discrimination by the employer, following a finding by a government agency of past discriminatory employment practices. Given the Court's approval of Kaiser reservation of positions for black workers without a specific finding of past discrimination, *a fortiori*, Sacramento County's race conscious remedy for *proven discrimination* is consistent with Title VII.

In *Weber*, as here (petition p. 15), opponents of the plan cited § 703(j) of the Civil Rights Act of 1964 (42 U.S.C. § 2000(e)-2(j)) to argue that a race conscious plan violated Title VII because it involved preferential hiring. This Court, however, has rejected that argument, stating that § 703(j) does not prohibit such affirmative action plans, but merely makes it clear that such plans are not required by Title VII. 443 U.S. at 205-206.

This Court in *Weber* also dismissed the claim, resurrected by petitioner here (petition p. 16) that *McDonald v. Santa Fe Transportation Company* (1976) 427 U.S. 273, forbids race conscious affirmative action. While *McDonald* held that Title VII protects whites as well as blacks, and while some white persons may be adversely affected by the

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[3]The Court did take note of the racial imbalance in Kaiser's craft employee population, and of exclusion of blacks from craft unions generally. 443 U.S. at 198-100.

consequences of affirmative action, the *Weber* court stated that to use *McDonald* to interpret Title VII to forbid "all race-conscious affirmative action would 'bring about an end completely at variance with the purpose of the statute' and must be rejected". 443 U.S. at 201-202.

**4. Weber applies to public employers**

Petitioner argues that *Weber* does not apply to the actions of the Sacramento County Civil Service Commission because the Commission is a public employer. While it is true that the Court in *Weber* narrowed its opinion to cover private employers, the purpose was to avoid any constitutional issue (443 U.S. at 200) and not to make a distinction for Title VII analysis. Moreover, this Court has stated clearly that there is no difference between private and public employers for Title VII purposes.

In *Dothard v. Rawlinson* (1977) 433 U.S. 321, the defendant Alabama Board of Corrections argued that more judicial deference is owed to a policy when it is established by state statute. The Court rejected this assertion.

> "The relevant legislative history of the 1972 amendments extending Title VII to the states as employers does not, however, support such a result. Instead, Congress expressly indicated the intent that the same Title VII principles be applied to governmental and private employers alike." 433 U.S. at 322, n. 14.

In addition, every circuit court which has considered this question has determined that private and public employers are treated alike under Title VII. (See cases cited by the California Supreme Court in opinion below, 26 Cal.3d at 273, n. 12.) Thus, *Weber* applies to Sacramento County as a public employer just as it applies to private employers.

**5. While Rule 7.10 provides for a voluntary affirmative action program by the employer, even if it is characterized as involuntary, it is consistent with Title VII**

Petitioner contends that a remedial race conscious hiring program under Rule 7.10 is involuntary and that *Weber* therefore does not apply because the Kaiser plan was voluntary. However, as noted earlier in this brief, the employer here is the County of Sacramento, not any particular office of the County. While the use of Rule 7.10 is obviously not supported by the County District Attorney's office, use of Rule 7.10 nevertheless involves voluntary action by the County agency which, under the County Charter, is responsible for the County civil service employment system. Rule 7.10 has not been imposed on the County by judicial or legislative action, but has been embraced by the County itself. Rule 7.10 is therefore a voluntary program agreed to by the employer, as was the program in *Weber.*

However, even if use of Rule 7.10 is characterized as involuntary, it is still consistent with Title VII. The hiring plan provided for in Rule 7.10 cannot be implemented in any County office unless there has first been a finding that the County has engaged in past acts of discrimination sufficient to constitute a violation of Title VII. A race conscious hiring program imposed by a court or other outside agency is a widely accepted remedy for violations of Title VII. See cases cited by the California Supreme Court at 26 Cal.3d 283, fns. 20 and 21.

**6. The remedy provided by Rule 7.10 is permissible under Weber**

While *Weber* did not establish explicit criteria for determining which voluntary affirmative action plans are permissible under Title VII, it did provide guidance for such

determinations in its explanation of why the plan at Kaiser was permissible. The Court's language makes it clear that two considerations were at work in approving the Kaiser plan. First, "[T]he purposes of the plan mirror[ed] those of the statute"; i.e., compatibility with the general objectives of Title VII. Second, a preferential hiring plan must not "unnecessarily trammel the interests of the white employees". The *Weber* plan met this second criterion because it did not require the discharge of whites, nor did it create an absolute bar to their promotion. Finally, it was temporary, intended to end when the racial imbalance was eliminated. 443 U.S. at 208-209.

These considerations are inherent in the operation of Rule 7.10. Since the rule "seeks to eliminate established patterns of racial segregation" in employment, it "clearly accords with the objectives of Title VII". Second, it operates no more harshly on non-minorities than the *Weber* plan. As in *Weber,* no non-minorities are to be discharged, there is no absolute bar to the hiring of non-minorities, and it is only a temporary remedy. 26 Cal.3d 275-276.

### 7. Application of Rule 7.10 does not violate the Equal Protection Clause of the Constitution

Petitioner argues that Rule 7.10 involves government action creating racial classifications which must be viewed under the "strict scrutiny" test of *Washington v. Davis* (1976) 426 U.S. 229, and earlier cases. Petitioner asserts that in this instance there is no showing of a compelling state interest, because there has been no showing of a constitutional or statutory violation by the petitioner. Moreover, the petitioner claims that this type of remedy is not necessary (petition pp. 18-22). However, as indicated *supra,* the sufficiency of the evidence or the findings is not at issue here. Further, the remedy here is of a type well-recognized by federal courts and this Court to respond to past discrimination.

This Court held a decade ago that the Constitution actually *compels* remedial race classifications to respond to certain instances of racial discrimination. *Swann, supra,* and companion cases. Since there is a compelling state interest in eliminating the consequences of past discrimination (*Louisiana v. United States, supra*), and since this often requires race-conscious remedies, such remedies are not violative of the equal protection clause.

This Court has recently established criteria for determining when race conscious remedies are appropriate. *University of California Regents v. Bakke* (1978) 438 U.S. 265; *Fullilove v. Klutznick* (1980) .... U.S. ...., 48 U.S. Law Week 4979. Both cases make it clear that such a remedy for proven past discrimination does not violate the Constitution.

In *Bakke,* Justice Powell distinguished the University admissions plan from cases in which there was a "determination by the legislature or a responsible administrative agency" that an employer had engaged in a discriminatory practice requiring remedial efforts (438 U.S. at 305). The concurring and dissenting opinion by Justices Brennan, White, Marshall and Blackmun also states that a race-conscious remedy would appropriately follow such a finding of past discrimination, meeting the strict scrutiny test (438 U.S. at 366, fn. 42). Thus, in *Bakke,* a majority of this Court endorsed race conscious remedies for proven past discrimination.

Whereas *Bakke* did not involve a finding of past discrimination, *Fullilove v. Klutznick, supra,* did. Justice Powell, in his concurring opinion, was therefore in a position to affirm a race conscious remedy on this basis. He articulated the prerequisites to a permissible race conscious remedy as:

> "First, the governmental body that attempts to impose a race-conscious remedy must have the authority to act in response to identified discrimination. . . . Second,

the governmental body must make findings that demonstrate the existence of illegal discrimination." Powell, J., Concurring, (48 U.S. Law Week 4992-4993).

**8. The application of Rule 7.10 requires findings by an agency authorized to make findings of past discrimination**

Appropriate administrative agencies as well as legislatures and courts are authorized to make findings of past discrimination. See *Fullilove (supra)*, Powell, J., concurring, 48 U.S. Law Week 4993, and *Bakke (supra)* at 438 U.S. 307 and 366, fn. 42, Brennan, J., concurring. In *Lau v. Nichols* (1974) 414 U.S. 563, for example, the Court upheld a remedy ordered by the Department of Health, Education and Welfare, after the Department found the San Francisco school system to be in violation of Title VI of the Civil Rights Act. See also *United Jewish Organizations v. Carey* (1977) 430 U.S. 144; *McDaniel v. Barresi* (1971) 402 U.S. 39; *Contractors Assoc. of Eastern Pa. v. Sec'y of Labor* (3d Cir. 1971) 442 F.2d 159.

The Civil Service Commission of Sacramento County is the County agency designated by the Sacramento County Charter to oversee the civil service system of the County. As the policy making and monitoring agency of the County employer and based on specific County charter provisions, the Commission is the administrative agency with the responsibility to prevent discriminatory employment practices by any County office. See Sacramento County Charter provisions quoted at 26 Cal.3d 268-270, fns. 6, 7 and 8. The adoption of Rule 7.10 by the Commission to establish procedures for making findings regarding such practices and for the fashioning of remedies was therefore a logical and necessary step in the fulfillment of the Commission's duties. The adoption and use of Rule 7.10 is also in full accord with the preference for voluntary compliance with Title VII clearly expressed by Congress, the Equal Em-

ployment Opportunities Commission and this Court. See *Alexander v. Gardner-Denver Company* (1974) 415 U.S. 36, 44. See also the EEOC guidelines which strongly encourage voluntary remedial affirmative action, 29 C.F.R. § 1608. Such compliance is possible for Sacramento County as an employer only through the activities of the County's Civil Service Commission.

Given a finding of past discrimination by the Commission, as an authorized administrative agency, the race conscious remedy provided for by Rule 7.10 does not violate the equal protection clause. Such a remedy, specifically aimed at ameliorating the effects of the County's past discriminatory practices, not unduly harsh on non-minorities. and temporary in scope, surely fits within the grounds approved by five Justices of this Court in *Bakke* and by the Court in *Weber*.

### 9. Rule 7.10 does not require racially proportionate representation in any job classification

The District Attorney erroneously asserts that the true goal of Rule 7.10 is to create " . . . a racially proportionate allocation of public jobs . . ." (petition p. 13). This assertion is in obvious conflict with the provisions of the rule itself which provide, in subdivision (a), that the purpose of the rule is to provide a procedure for adjustment of disproportionate representation of minority personnel in the County work force *which is a result of discriminatory employment practices.* There is nothing in Rule 7.10 that purports to require racially proportionate representation. As expressly provided in subdivision (d)(2) of the rule, the total number of minority appointments " . . . *shall not be greater* than necessary to attain a fair approximation of minority representation in the classification consistent with the population mix in the County of Sacramento, including the populations of all cities." (Emphasis added)

It is apparent that Rule 7.10 does not require racially proportionate representation. Instead, the rule itself *prohibits* use of the rule to achieve anything greater than racially proportionate representation in a given job classification. After the Commission has held the hearing required by the rule and given consideration to all relevant factors, as required by the rule, it is entirely possible that the Commission will adopt a minority hiring order which falls far short of attempting to achieve racially proportionate representation. The order challenged by the District Attorney in the instant case is a good example. Although the order was never actually implemented *(supra)*, by its terms it would have been operative only until the District Attorney had hired two or three minority attorneys. At most, this would have resulted in approximately 8% minorities in the classes of Attorney I and II in petitioner's office—far less than the 19.5% minority population in Sacramento County generally.

The District Attorney's apparent fear that Rule 7.10 could be improperly applied to achieve "race proportionate representation" in the County work force provides no support for claiming that Rule 7.10 itself is invalid. The speculative possibility of discriminatory or other invalid administration of a statute or a rule is not a ground for holding it void. See *Estate of Monks* (1941) 48 C.A.2d 603, 614; *In re Culver* (1927) 84 C.A. 295, 297; and 16 Am.Jur.2d, *Constitutional Law*, Sec. 228.

### 10. Denial of certiorari is appropriate on the basis of actions by this Court in other relevant cases

The recent grant of certiorari in the case of *Minnick v. California Department of Corrections*, Docket No. 79-1213, does not support granting the petition here, because that case is significantly different in its essential points. In *Minnick*, there was no finding of past discrimination. The

major justification for the race conscious promotion and transfer plan was that race is a job-related factor in California prisons. In the present case, however, with a remedy explicitly for proven past discrimination, no such question is presented.

The instant case is in many ways very similar to *Lindsay v. City of Seattle* (1976) 86 Wn.2d 698, 548 P.2d 320; certiorari denied, 429 U.S. 886. In *Lindsay,* Washington's highest appellate court upheld Seattle's voluntary affirmative action program. Seattle's program required that a member of a racial minority group be appointed to one out of every three job vacancies to achieve minority group representation in city employment consistent with the population mix in the area. The Washington Supreme Court held that in discharging the city's obligation under the Civil Rights Act of 1964 the facts warranted the use of the minority employment preference to eradicate the effects of past discriminatory practices such as the use of unvalidated tests.

In addition to the use of unvalidated tests as evidence of past discrimination, the Washington court relied on statistics showing underrepresentation of minority employees as sufficient to establish a prima facie case of discrimination (*Lindsay v. City of Seattle, supra,* at 548 P.2d 325).

It is significant that the Seattle minority employment preference program was implemented *based only on statistics.* If statistics showed minority underrepresentation for any job, including promotional appointments, minorities were appointed on a preferential basis. Unlike the Seattle procedure, which was automatically implemented based on statistics, Rule 7.10 includes express safeguards to assure adequate notice, a public hearing and findings before a preference can be ordered. The Commission can order a preference only if the evidence establishes that the under-

representation was caused by past discriminatory practices *and* that it is feasible to adjust minority representation as provided in the rule.

Rule 7.10, with its specific procedural safeguards and evidentiary requirements, is therefore even more defensible than Seattle's automatically implemented procedure which was upheld in *Lindsay*. Certiorari should be denied in the instant case for the same reasons that the petition for writ of certiorari in the *Lindsay* case was denied by this Court (Docket No. 76-196, 429 U.S. 886).

## CONCLUSION

For the reasons discussed above, this case has become moot and the District Attorney lacks standing to challenge the validity of Rule 7.10 in this Court. In any event, the California Supreme Court, based on a thorough and well reasoned opinion, correctly concluded that Rule 7.10 is valid in that it does no more than specify a procedure whereby Sacramento County, as an employer, may voluntarily adopt a race conscious hiring plan to remedy the effects of the County's own past discriminatory hiring practices. Since the California courts have not yet considered the question of whether the evidence was sufficient to support the Commission's order, that issue is not ripe for consideration by this Court. Denial of the petition is supported by, and would be consistent with, the decisions of this Court in other cases.

The petition for writ of certiorari should be denied.

Respectfully submitted,

L. B. ELAM
COUNTY COUNSEL OF
SACRAMENTO, CALIFORNIA
THOMAS A. DARLING
COUNSEL OF RECORD
SUPERVISING DEPUTY
*Attorneys for Respondents*

**(Appendix follows)**

## APPENDIX A

To: Herb Jackson
District Attorney

From: John Canipe, Staff Analyst
Civil Service Commission

Subject: Civil Service Commission Rule 7.10

Attached is a copy of the Findings and Order rescinding the Commission's Findings and Order of September 25, 1975, as adopted by the Civil Service Commission at its meeting of April 24, 1980.

/s/ JOHN CANIPE
John Canipe, Staff Analyst
Civil Service Commission

JC:JM

Before the Civil Service Commission
County of Sacramento
State of California

In the Matter of the Implementation of Civil Service Commission Rule 7.10 for Appointment of Attorneys in the Office of the District Attorney.

# FINDINGS AND ORDER RESCINDING THE COMMISSION'S FINDINGS AND ORDER OF SEPTEMBER 25, 1975

## FINDINGS

I

On September 25, 1975, this Commission adopted its Findings and Order pursuant to Commission Rule 7.10 relating to appointments in the class of Attorney I in the Sacramento County District Attorney's office. Said order required that appointments in the class of Attorney I in the District Attorney's office be made on the basis of an alternating ratio of 2:1 so that at least one minority attorney would be appointed for every two non-minority attorneys. Said order further provided that said ratio would be applied only until the percentage of minority attorneys in the classes of Attorney I and Attorney II in the District Attorney's office reached 8%.

II

Before said order could be implemented, the District Attorney's office initiated legal action challenging the validity of said order and the validity of Rule 7.10, which action

has resulted in a decision by the California Supreme Court issued on January 25, 1980, upholding the validity of Rule 7.10, but remanding the case back to the Superior Court for further proceedings in accordance with the decision in *Price v. Civil Service Commission* (1980) 26 Cal.3d 257.

III

Because of the filing of said court action, said order has not at any time been implemented and Rule 7.10 has not in any way been utilized or applied as a basis for any appointment of any person to any position in the attorney classes used by the office of the District Attorney. However, as shown on the attached report from the Chief of the Special Employment Affirmative Action Division of the Department of Personnel Management, dated April 3, 1980, the number of minority attorneys employed by the District Attorney's office at the Attorney I and II levels has exceeded 8% of all attorneys employed at the Attorney I and Attorney II levels. The high point was reached on or about March 22, 1978, when the number of minority attorneys at the Attorney I level equalled 50% and the number of minority attorneys at the Attorney II level equalled 11.76%. As indicated in said report, on that date, of 23 attorneys at the Attorney I and Attorney II levels in the District Attorney's office, five were minority attorneys, resulting in a combined percentage of 21.7% minority attorneys at the Attorney I and Attorney II levels.

IV

The foregoing facts show that since the Commission's order of September 25, 1975, was issued, the 8% goal specified in said order has not only been reached, it has been substantially exceeded, as a result of the employment practices of the District Attorney's office, without any use of

an alternating ratio as a basis for attorney appointments pursuant to Rule 7.10 and without implementation of said Commission order of September 25, 1975.

V

As expressly provided in paragraph 2 of said Commission order of September 25, 1975, the 2:1 alternating ratio as a basis for appointment of minority attorneys was to " . . . be applied *only until* the percentage of minorities in the classes of Attorney I and Attorney II in the District Attorney's office is 8%." (Emphasis added)

VI

Subdivision (f) of Commission Rule 7.10 provides as follows:

> "(f) *An order may be rescinded* or revised from time to time by the Commission as it determines to be necessary or appropriate. *Such action may be taken by the Commission on its own motion* or at the request of any interested person. *In determining whether to rescind* or revise an order, *the Commission may consider any relevant information including* but not limited to the needs of the service, *changed circumstances*, problems encountered in implementing the order, and information which was not previously considered by the Commission." (Emphasis added)

VII

On the basis of the foregoing findings, and as expressly authorized by subdivision (f) of Rule 7.10, the Commission finds that because of changed circumstances, the Commission's findings and order of September 25, 1975, can serve no purpose which has not already otherwise been achieved. Said findings and order should therefore be rescinded.

## ORDER

For the reasons set forth above, the Commission's findings and order of September 25, 1975, are hereby rescinded in their entirety and shall not be implemented nor be of any effect for any purpose whatsoever.

ADOPTED as the findings and order of the Civil Service Commission on the 24th day of April, 1980.

/s/ ARCHALENE A. MARTIN
for Raymond T. Butler
*Chairperson, Civil Service*
*Commission of the County*
*of Sacramento*

COUNTY OF SACRAMENTO
Inter-Department Correspondence

Date: April 3, 1980

To: Gerald M. Pauly
Director of Personnel Management

From: Clyde W. Rainwater, Chief
Special Employment Affirmative Action

Subject: District Attorney (Criminal I & II) Minority Representation 9/8/75 through 3/27/80

This list represents a random sequential sampling of minority attorneys in the District Attorney's office for the above period. The statistics reflect those minority attorneys on board approximately every other pay period through the period September 8, 1975 through March 27, 1980.

| Date | Class | Total Attys. | Min. Attys. | Percentage of Total Min. Attys. |
|---|---|---|---|---|
| 9-12-75 | Attorney II | 24 | 1 | 4.16 |
| | Attorney I | 10 | 0 | 0 |
| 2-26-76 | Attorney II | 26 | 1 | 3.84 |
| | Attorney I | 2 | 0 | 0 |
| 4- 1-76 | Attorney II | 26 | 1 | 3.84 |
| | Attorney I | 4 | 0 | 0 |
| 5-27-76 | Attorney II | 24 | 1 | 4.16 |
| | Attorney I | 3 | 0 | 0 |
| 9-22-77 | Attorney II | 7 | 0 | 0 |
| | Attorney I | 17 | 3 | 17.64 |
| 11- 3-77 | Attorney II | 9 | 0 | 0 |
| | Attorney I | 17 | 3 | 17.64 |
| 1-25-78 | Attorney II | 17 | 3 | 17.64 |
| | Attorney I | 4 | 0 | 0 |
| 3-22-78 | Attorney II | 17 | 2 | 11.76 |
| | Attorney I | 6 | 3 | 50.00 |
| 6-29-78 | Attorney II | 20 | 2 | 10.00 |
| | Attorney I | 9 | 1 | 11.11 |
| 10-26-78 | Attorney II | 18 | 2 | 11.11 |
| | Attorney I | 9 | 1 | 11.11 |
| 12-21-78 | Attorney II | 18 | 2 | 11.11 |
| | Attorney I | 11 | 1 | 9.09 |

*(Table continued on following page)*

*(Table continued from preceding page)*

| Date | Class | Total Attys. | Min. Attys. | Percentage of Total Min. Attys. |
|---|---|---|---|---|
| 2-15-79 | Attorney II | 12 | 2 | 16.66 |
| | Attorney I | 14 | 1 | 7.14 |
| 4-26-79 | Attorney II | 13 | 2 | 15.38 |
| | Attorney I | 8 | 1 | 12.50 |
| 6- 7-79 | Attorney II | 12 | 1 | 8.33 |
| | Attorney I | 12 | 1 | 8.33 |
| 10-25-79 | Attorney II | 14 | 0 | 0 |
| | Attorney I | 13 | 1 | 7.69 |
| 12-20-79 | Attorney II | 19 | 1 | 5.26 |
| | Attorney I | 8 | 0 | 0 |
| 2-14-80 | Attorney II | 18 | 1 | 5.55 |
| | Attorney I | 10 | 1 | 10.00 |
| 3-27-80 | Attorney II | 19 | 1 | 5.26 |
| | Attorney I | 9 | 1 | 11.11 |

cc: Herb Jackson, District Attorney
Tom Darling, County Counsel